



THE ATTORNEY GENERAL *of* TEXAS
&
THE TEXAS DEPARTMENT *of* AGRICULTURE

May 1, 2012

The Honorable Cass Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Sunstein:

We write today to express concern with the “Final Guidance on Identifying Waters Protected by the Clean Water Act” (Guidance) proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) and to request that the Office of Management and Budget thoroughly review the Guidance. The Guidance fails to comply with Executive Order 13563 because it greatly expands the two agencies’ regulatory authority and will produce certain and overwhelming costs, regulatory uncertainty and questionable public benefit.

The Guidance causes great concern for the farmers, ranchers, landowners, and the State of Texas because it arbitrarily expands federal control over both private and state-owned water and land resources. Through the Guidance, EPA and the Corps assume an unprecedented amount of authority and create the unfettered potential for expanded federal regulation by adopting the “significant nexus” test to define waters of the United States. Moreover, EPA’s interpretation of the Clean Water Act (CWA) is based upon a Supreme Court case that produced a divided decision and a total of five opinions. *Rapanos v. United States*, 547 U.S. 715 (2006). The significant nexus test that the EPA and the Corps adopts garnered the support of only a single justice. *Id.* at 759-87 (Kennedy J., concurring in the judgment).

The legally dubious significant nexus test adopted by the EPA and the Corps leaves it to field agents to determine, on a case-by-case basis, whether the federal government has authority to regulate a body of water. Committing to individual field agents the task of implementing such a nebulous standard grants too much authority to the unaccountable federal bureaucracy and threatens to expand the amount of land under federal regulation beyond what Congress intended when it enacted the CWA. The fuzzy test adopted by the Guidance also paves the way for divergent decisions regarding similar bodies of water across the country – creating uncertainty instead of clarity.

What is more, the Guidance grossly understates the impact of the significant nexus test. It is simply inconceivable and irresponsible for EPA and the Corps to suggest in the economic

analysis of the Guidance that a regulatory measure of this magnitude would only add a maximum of 2,517 acres of wetlands and 9.3 miles of stream banks to the area subject to mitigation.¹ These estimates – and any financial impact projections associated with them – reflect the results of an unreliable survey process.

Instead, conservative estimates indicate that Texas has approximately 11,200 named streams and rivers with a total combined length of 191,228 miles.² A high percentage of these waterways produce only intermittent flows, meaning it is highly improbable they are currently regulated under the significant level of federal jurisdiction proposed by the Guidance. Because the Guidance document proposes to grant to the EPA and the Corps of Engineers the power to regulate these waterways, up to 153,000 miles of streams in Texas alone could be impacted. Of course, there is no way to know for sure until a given field agent renders his or her own view.

But, the federal government's power grab does not end there. As you know, subjecting additional surface water bodies to regulation will effectively impose unnecessary federal regulatory oversight on surrounding property owners. Approximately 86 percent, or 144 million acres, of Texas' 269,000-square-mile land mass is privately owned and utilized in agricultural production.³ An untold number of streams and private surface water bodies crisscross this landscape. By applying the unscientific significant nexus standard, the Guidance threatens to subject private and state-owned land to an unprecedented and unnecessary level of federal control. Private agricultural, ranch and forest lands are working lands that provide a benefit to the environment and generate an economic impact of nearly \$700 per acre on average for the state - a total of about \$100 billion per year.⁴

Certainly it is improbable that the EPA and the Corps have the resources to immediately regulate all private land, and all state and privately-owned water, in Texas. However, the significant nexus approach unnecessarily and inappropriately empowers these federal agencies to do so in the future. In contrast to the Guidance, the estimates outlined in this letter demonstrate the devastating impact the Guidance could have on a single state.

Further, it is unconscionable that the EPA and the Corps would rely on internal staff surveys to justify a regulation as far-reaching as this one. The so-called methodology is based on average acres, miles and costs which were purposefully chosen to provide a politically acceptable cost-benefit analysis. The agencies' decision to utilize the low range on mitigation acreage demonstrates an apparent intent to understate costs, while the inclusion of unsupported, anecdotal statements of benefits suggests that the EPA and the Corps are overstating the benefits of the Guidance. Further, the agencies' analysis focuses only on Section 404 permitting, ignoring the fact that additional waterways and lands will become subject to Section 311, 303, 401, and 402 permitting.

¹ "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction," U.S. Environmental Protection Agency, April 27, 2011.

² "Texas Nonpoint Source Management Program, 2012," Texas Commission on Environmental Quality and Texas State Soil and Water Conservation Board.

³ "Texas Land Trends," Institute for Renewable Natural Resources, Texas A&M University and U.S. Department of Agriculture, Census of Agriculture, 2007.

⁴ "Texas Ag Stats," Texas Department of Agriculture, 2011.

Thank you for the opportunity to provide input to the Office of Management and Budget on the true impact of the guidance document. An unbiased review of the impact of this regulation is critical to protect against EPA and the Corps insistence on moving forward with this devastating and legally unsupported regulatory scheme. Please feel free to contact either of us if we may provide additional information or assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Abbott", written in a cursive style.

Greg Abbott
Attorney General of Texas

A handwritten signature in black ink, appearing to read "Todd Staples", written in a cursive style.

Todd Staples
Commissioner of Agriculture